91-325

No. _____

In The

Supreme Court of the United States

October Term, 1991

THE SUPERIOR COURT, COUNTY OF SAN DIEGO,

Petitioner,

THE COPLEY PRESS, INC.,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal For The State Of California Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must jurors disclose confidential information about themselves or others without a prior assurance of confidentiality; and

2. Is an in-camera proceeding the only way confidential information can be communicated by a juror to the judge and attorneys?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding below were:

Petitioner/Appellant:

The Superior Court of the State of California, in and for the County of San Diego

Respondent/Appellee:

The Copley Press, Inc.

Real Parties in Interest:

The People of the State of California, represented by the Office of the District Attorney of the County of San Diego

Roberta D. Pearce

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OPINIONS BELOW

The opinion of the Court of Appeal for the State of California, Fourth Appellate District, Division One (hereinafter referred to as "Court of Appeal") was filed on February 26, 1991. It was ordered to be published in the official reports. It is reprinted in the appendix hereto, beginning at page App. 1.

Petitioner requested review by the California Supreme Court. The California Supreme Court's May 23, 1991 unpublished order denying review is reprinted in the appendix hereto at page App. 22.

JURISDICTION

In its answer to the petition for peremptory writ of mandate filed in the Court of Appeal, this petitioner first stated that the issue of this case pits the freedom of the press against both a criminal defendant's Sixth Amendment right to trial by an impartial jury and the jurors' constitutional right of privacy. In its opinion filed on February 26, 1991, the Court of Appeal determined that the freedom of the press would prevail. The California Supreme Court denied review on May 23, 1991.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 United States Code section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves a balancing of the First Amendment right of freedom of the press against a

criminal defendant's Sixth Amendment right to trial by an impartial jury and the jurors' right of privacy guaranteed by the Ninth Amendment. Those rights, in pertinent part, are as follows:

1. United States Constitution, First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press;"

2. United States Constitution, Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,. . . . "

3. United States Constitution, Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Ninth Amendment has been construed to include a right of privacy. (*Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L.Ed.2d 510].)

STATEMENT OF THE CASE

This case stems from a criminal proceeding entitled The People of the State of California v. Roberta D. Pearce (San Diego Superior Court No. CRN 15334). Ms. Pearce was charged with the murder of her husband, with the special circumstances of being committed for financial gain (California Pen. Code, § 190.2(a)(1)) and while laying in wait (California Pen. Code, § 190.2(a)(15)). Because special circumstances were alleged, the death penalty was

possible. The jury was to decide guilt or innocence and, if guilty, the punishment.

In accordance with established court procedures authorized by California Code of Civil Procedure section 205 and Division VIII, section 4, rule 4.1 of the San Diego County Superior Court Rules, the Jury Commissioner distributed a detailed questionnaire to 300 prospective jurors in order to determine their eligibility to serve. Because the case involved the death penalty, the superior court and petitioner herein instructed the Jury Commissioner to include questions submitted by the trial attorneys to facilitate a change of venue motion and assist in the voir dire process. Some of the questions sought to determine the extent to which the prospective jurors had been exposed to pre-trial publicity and solicited their views regarding issues involved in the case, such as capital punishment. For example, the jurors were asked, "Have you ever sought any type of counseling for problems in a marriage from someone such as a priest, minister, counselor or therapist? Were you the victim of child molestation or other forms of child abuse? Has chemical dependency (drugs or alcohol) affected your life, either personally or through a close friend or family member?"

The questionnaire advised the jurors that the information contained in the questionnaire would become part of the court's permanent record and would "not be distributed to anyone except [the trial court], [the court's] staff and the attorneys in the case while it is pending." The questionnaire also advised the jurors that their answers "must be [their] own and are made subject to [their] oath as a juror to respond fully and truthfully."

After the prospective jurors filled out their questionnaires, they were called by appointment for individual voir dire, which was held in the courtroom open to the public. Approximately one-half of the prospective jurors were excused for hardship or other cause. At the point when there were 80 veniremen who had not been excused for cause, the trial judge divided them into two groups of 40 and told each group to report at a specific time. At these times, the attorneys were afforded the opportunity to exercise their peremptory challenges. The peremptory challenges for all prospective jurors were exercised within two and one-half to three hours.

The entire voir dire examination took 18 days, including one day for the veniremen to fill out the questionnaires. This compares to other capital cases where written questionnaires were not used in which the voir dire process took six to eight weeks.

During the oral voir dire examination of the jurors in this case, a reporter for *The San Diego Union* (The Copley Press, Inc., respondent herein) attended the proceedings and submitted a written request to the trial judge asking for access to the completed questionnaires. This request was denied. On January 25, 1990, counsel for The Copley Press, Inc., filed a motion requesting the superior court to release the questionnaires. On February 22, 1990, the trial judge heard argument on the motion but denied release of the questionnaires, primarily because it considered the questionnaires to be pre-trial discovery and not subject to public review.

On March 12, 1990, Ms. Pearce was found guilty. On March 14, 1990, The Copley Press, Inc., filed a Petition for

Peremptory Writ of Mandate with the Court of Appeal seeking immediate review of the superior court's ruling.

On April 20, 1990, the superior court filed its answer to the petition and lodged eight declarations in opposition to the petition. Seven of the declarations were from jurors objecting to an unreasonable invasion of their constitutional right of privacy by release of the questionnaires. The eighth was from one of Ms. Pearce's defense attorneys objecting to an impairment of her constitutional right to an impartial jury which would be caused by the public release of the questionnaires.

On September 11, 1990, the Court of Appeal issued a writ of mandate directing that in all future cases the jury questionnaires be made public. On October 18, 1990, petitioner filed a petition seeking review in the California Supreme Court.

On December 13, 1990, the California Supreme Court granted review but remanded the matter back to the Court of Appeal for reconsideration in light of another recent court decision. Accordingly, the Court of Appeal vacated its prior opinion on December 13, 1990. Letter briefs were filed by the parties and on February 26, 1991, the Court of Appeal reissued its original opinion with minor modifications. A writ of mandate issued:

> " . . . directing the superior court in all future cases in which jury questionnaires are used to (1) segregate juror qualification information from other questions, (2) plainly instruct the venirepersons in the body of the questionnaire that (a) the written responses are not confidential, i.e., the questionnaires are public records, and (b) the venirepersons have a right to request an in camera hearing to discuss their responses

> to any questions they do not wish to answer in writing, and (3) provide access to the questionnaires in accordance with the views expressed [in the opinion]."

A concurring opinion was added by one of the three deciding justices recommending that (1) the written warning be in bold type and placed in the questionnaire's introduction warning the jurors that their written responses will not be confidential; (2) that the court orally alert the prospective jurors that their responses were not confidential and would be accessible by newspapers, radio, television and all other forms of print or electronic media; (3) that the trial court should also orally advise prospective jurors that if they believe public disclosure of their answer to particular question(s) may be embarrassing or otherwise infringe on their privacy rights, they should ask for a hearing in chambers before answering the question(s); and (4) that the court should further orally instruct prospective jurors that the attorneys and court reporter will be present during any such chambers proceeding and that their request for confidentiality does not ensure the answer will remain confidential.

In reviewing the constitutional issues, the Court of Appeal cited this Court's decision in *Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501 [78 L.Ed.2d 629], as establishing that the First Amendment to the United States Constitution affords a right of access to the voir dire examination of the jury in a criminal trial. The Court of Appeal noted that this right is not absolute, again citing this Court's decision in *Press-Enterprise Co., supra,* but disposing of the superior court's arguments for maintaining the confidentiality of the questionnaires as follows:

"Here, the respondent Superior Court argues maintaining the confidentiality of the questionnaires supports three overriding interests: (1) administering an expeditious trial; (2) preserving the defendant's right to a fair and impartial jury trial; and (3) protecting the juror's right to privacy.

While efficient judicial administration is a praiseworthy purpose and one we applaud, it does not reach constitutional dimensions. As much as we would like to see judicial proceedings run efficiently and expeditiously, we cannot give much weight to such a goal when compared to a constitutional interest.

With respect to protecting the criminal defendant's right to a fair trial, we agree it is the sort of compelling interest that can override the First Amendment right of access. But there is no showing that in this case these two constitutional interests were in conflict. In *Press-Enterprise, supra,* 464 U.S. 501, the Supreme Court said that when the presumption of openness is overcome by an overriding interest, the trial court must articulate the overriding interest 'along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' (*Id.* at p. 510.) The trial court made no such findings below. In this writ proceeding, the respondent Superior Court, in discussing the defendant's right to a jury trial, advances five reasons for preserving the confidentiality of the questionnaires: (1) the questionnaires equalized access for the parties to discovery of prospective jurors' backgrounds; (2) the prospective jurors gave more complete, frank and open information because of the assurances given them that their responses would be confidential; (3) counsel could more intelligently exercise challenges because biases and prejudices of the prospective jurors were

more readily detectable through the use of the confidential questionnaires; (4) the questionnaires enabled counsel to be better prepared to examine the prospective jurors; and (5) use of the questionnaires markedly expedited the voir dire procedure. Again, we note the laudable nature of these results, but is obvious – particularly in the absence of specific facts or findings relevant to this case – the absence of any of them or all of them would not have prevented the defendant from having a fair trial. Furthermore, in addition to making findings, the trial court is required to consider alternatives to closure. (*Press-Enterprise, supra,* 474 U.S. at p. 511.) Here, the trial court failed to consider alternatives to maintaining the confidentiality of the questionnaires. 'Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire.*' (*Ibid.*)

With respect to the jurors' right to privacy, respondent Superior Court has identified another interest of constitutional dimension. (*Roe v. Wade* (1973) 410 U.S. 113 [93 S.Ct. 705]; *Griswold v. Connecticut* (1965) 381 U.S. 479 [85 S.Ct. 1678]; Cal. Const. Art. I, § 1.) Further, it is clear that here this interest has the potential to be in conflict with the First Amendment right of access to the questionnaires. In *Press-Enterprise, supra,* 474 U.S. 501, 511-512, the Supreme Court observed:

'The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. . . . The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of the sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.' (*Press-Enterprise, supra,* 464 U.S. at pp. 511-512.)

Thus, *Press-Enterprise, supra,* 464 U.S. 501, teaches that an individualized approach rather than a blanket one is appropriate in considering the privacy rights of prospective jurors. Not only does such an approach preserve the constitutional values of openness, it also enables the trial court to 'ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy.' (*Id.* at p. 512.)

This Supreme Court precedent also instructs that when limited closure is in order, the trial should strive to restrict access as narrowly as possible so that the salutary nature of openness can be preserved to the largest extent possible. (*Id.* at pp. 512-513.)

We find the suggestions offered in *Press-Enterprise, supra,* 464 U.S. 501, on how to minimize the effects of closure applicable to the use of confidential questionnaires. For example, in *Press-Enterprise,* the Supreme Court suggested:

'When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy

interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.' (*Id.* at p. 512.)

Of course, each case will have its own particular facts regarding the extent to which legitimate privacy rights should be protected. In any event, pursuant to the guidance of the United States Supreme Court, we believe the proper approach is to have the superior court advise the venirepersons that they have the right to request in camera hearings on sensitive questions rather than writing their answers in the questionnaire. Counsel should be present and the session should be reported, with the trial court determining afterward on the record whether a legitimate privacy interest warrants protection. If it does, the trial court should then seal the transcript of the hearing. Henceforth, the superior court shall inform the venirepersons of their right to request in camera hearings to answer specific sensitive questions rather than filling out those answers on the questionnaire form. No explicit or implicit promise of confidentiality should be attached to the information contained in the questionnaires; rather the venirepersons shall be expressly informed the questionnaires are public records. Second, the superior court should provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral voir dire. Public access shall not be provided to questionnaires filled out by venirepersons who are not called to the jury box."

REASONS FOR GRANTING THE PETITION

There are three reasons for this Court to grant this petition:

1. Protecting the jurors' right to privacy;

2. Preserving a criminal defendant's right to a fair and impartial jury trial; and

3. Allowing the use of written questionnaires for jury voir dire to expedite trials.

These three reasons were presented to the Court of Appeal but it felt compelled to rule as it did because of its interpretation of this Court's holding in *Press-Enterprise Co. v. Superior Court, supra,* 464 U.S. 501 (104 S.Ct. 819) [78 L.Ed.2d 629]. The superior court believes the Court of Appeal misinterpreted the holding of the *Press-Enterprise Co.* case and, as a result, gave an improper balancing of the constitutional issues involved. This Court did not expressly consider the issues here raised in the *Press-Enterprise Co.* decision and should reassess the balancing of constitutional issues involved and provide direction. The superior court believes that a criminal defendant's right to a fair and impartial jury, the jurors' right of privacy, and the expeditious administration of the criminal justice system outweigh the limited infringement of the press' right of access which might occur as a result of using written questionnaires. The superior court's reasoning is set forth below.

I

THE COURT OF APPEAL HOLDING DEPRIVES PROSPECTIVE JURORS OF THEIR CONSTITUTIONAL RIGHT OF PRIVACY

The writ filed by Copley Press, Inc. challenged the confidential use of questionnaires to assist the oral voir dire examination of prospective jurors. The appropriate legal standard is that authorized by this Court for oral voir dire examinations in the case of *Press-Enterprise Co. v. Superior Court, supra,* 464 U.S. 501 (104 S.Ct. 819) [78 L.Ed.2d 629]. In that case, this Court held that the oral voir dire examination of prospective jurors had to be open to the public. However, it recognized that some questions of jurors might elicit confidential information which the jurors would not want to disclose publicly. In such cases, a juror could request to answer the question in camera with only the judge, attorneys, and a court reporter present. As a result of the in camera proceeding, the juror might be excused from serving. The public and the press would not be allowed into chambers but might later receive a transcript of the proceeding if the juror's valid privacy rights could still be safeguarded by the disclosure.

The petitioning superior court in this case contends that it may utilize a written questionnaire to assist in the oral voir dire examination without violating the legal standard this Court set in *Press-Enterprise Co.* The procedure would be that a questionnaire would be sent to each prospective juror prior to commencement of trial, including the oral voir dire examination. To facilitate a juror's ability to choose confidentiality for each question, the questionnaire would have a box placed next to each

question which, if checked by the juror, would indicate his or her request for the written response to be given only to the judge and attorneys. By adopting this procedure, the questionnaire excludes the public and the press from access to information no more than would occur using the oral voir dire examination process approved by the United States Supreme Court in *Press-Enterprise Co.*

The Court of Appeal rejected any use of a confidential questionnaire as a means of disclosing confidential information by holding that jurors could not be given any *prior* assurance that their written responses would not be made public and released to the media. This holding assumes that the *Press-Enterprise Co.* case holds that no *prior* assurance can be given to a juror who, during the oral voir dire examination, requests to answer in camera to the judge and attorneys. This is clearly an extension of the *Press-Enterprise Co.* case and is unwarranted inasmuch as it will deprive jurors of their constitutional right of privacy without due process of law and impose a time consuming and costly oral voir dire process upon an already overburdened court system. How this result occurs is explained in greater detail below.

In *Press-Enterprise Co., supra,* 464 U.S. 501 [78 L.Ed.2d 629] this Court said:

> "To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment,

> may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record.
>
> By requiring the prospective jurors to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment." (*Press-Enterprise Co., supra,* 464 U.S. 501 [78 L.Ed.2d 629 at 639-640].)

The Court of Appeal interpreted this language to mean that prospective jurors are required to disclose confidential information about themselves and others at their peril. In other words, a prospective juror is asked to disclose the confidential information and *afterwards* the court decides whether or not that information will be released to the public and media. If the Court of Appeal is correct, our courts will be depriving jurors of their constitutional right of privacy without due process of law.

Following the Court of Appeal's view of the law, a juror during the jury selection process of a capital case confronts the following dilemma:

The court or an attorney might ask a juror during oral voir dire the question, "Were you the victim of child molestation or other forms of child abuse?"

The juror who had been molested or abused as a child would have four options in response: (1) answer "yes" and explain the answer; (2) answer "no;" (3) refuse to answer; or (4) request an opportunity to respond in camera.

The first option would be undesirable for the juror because it is a full public disclosure of the child molestation or abuse which occurred to him or her. This would subject the juror and possibly others to public embarrassment.

The second option is also undesirable because it is a lie while under an oath to tell the truth. Such a lie is perjury – a felony (California Pen. Code, §§ 17(a) and 126). Nevertheless, human nature is such that many jurors may be sorely tempted to lie under the unpleasant circumstances in which they find themselves. A lie would be unfortunate because not only is the juror's integrity compromised, but a possible bias or prejudice goes undisclosed, posing a threat to the jury system and the defendant's constitutional right to a fair and impartial jury.

The third option would be contempt of court and, if jurors were not required to disclose their biases and prejudices, the constitutional right to a fair and impartial jury would be meaningless. Nevertheless, if a juror is thoughtful and properly advised by competent counsel, he or she might choose this option. A public request for an in camera proceeding in which to respond by itself is

an admission. Furthermore, without a reasonable assurance of confidentiality before disclosure, a request for an in camera conference may not protect the juror anyway.

The fourth option according to the Court of Appeal would take place like this: A juror would be escorted into the judge's chambers, out of the presence of the public in the courtroom but with attorneys and a court reporter present. In the chambers, the judge would probably say something like this: "Okay, go ahead and tell us what you did not want to say in the open courtroom. But before you speak, you are warned that anything you disclose may be made public and released to newspapers, radio and television. After your disclosure, I will decide whether it will be kept confidential."

Would any juror be willing to reveal secrets with such an empty assurance of confidentiality? Even if secrets are revealed, has not the juror been coerced into revealing those secrets by the same judicial process that is supposed to guarantee due process before a fundamental right, such as privacy, is taken?

If a juror did disclose the information without a prior assurance of confidentiality, we believe the juror's constitutional right of privacy would have been taken without due process of law. The process has placed the juror in an adversarial position and forced him or her to make choices that might not have been made with the advice of legal counsel. Giving the juror the right to legal counsel for advice on how best to protect his or her right of privacy would encumber the voir dire process and add to the burden borne by the courts caused by an already lengthy voir dire process.

The dilemma created is immense. The solution is simple. Jurors should not be required to disclose confidential information about themselves or others before a reasonable assurance of confidentiality is given.

Correctly viewed, we believe the fourth option would generally proceed as outlined above except that a juror's request for the in camera response would suffice to invoke confidentiality for everything that transpires in chambers out of the presence of the public. A transcript would be made but not released to the public unless later there was a request for its release. It would not be released to the public later until the juror had an opportunity to object and the court could be assured that the juror, through anonymity of some other means, would not be publicly subjected to embarrassment or ridicule. Admittedly, the transcript of the in camera proceedings may never be disclosed, but in balancing the jurors' right of privacy and the party litigants' right to a fair and impartial jury against the public's right to know, it seems reasonable under these limited circumstances to balance the competing interests in favor of the jurors' right of privacy so the right to a fair and impartial jury can be preserved.

If the prospective jurors can constitutionally be granted an assurance of confidentiality beforehand as just explained, it makes no difference whether their disclosures are made orally in camera or in written questionnaires. If written questionnaires are used, the jurors can be given the right to elect confidentiality and that election can be done individually for each question. This can be done simply by placing a box next to each question which, if checked by the responding juror, would indicate

his or her request for confidentiality. These answers would not be disclosed to the public but would be released only to the judge and the attorneys, the same as with in camera oral disclosures. All other answers would be disclosed. The court would be able to monitor any abuses of this process and deal with them individually. This should not be a burdensome task in comparison to the burden of having to deal with all confidential disclosures in an in camera proceeding.

II

THE COURT OF APPEAL'S HOLDING THREATENS TO DEPRIVE CRIMINAL DEFENDANTS OF A FAIR AND IMPARTIAL JURY

Prospective jurors placed in the dilemma of being forced to disclose confidential information to the public and media might choose not to disclose the information. In *Press-Enterprise Co., supra,* 464 U.S. 501 [78 L.Ed.2d 629] this Court was not asked to fully consider the impact of jurors being asked a confidential question in a courtroom open to the public and being required to answer "yes," "no," or "I request to give my answer to the judge in privacy." It is obvious that when a juror chooses to give an answer to the judge privately, that that request itself is a public admission of some fact which the juror does not wish to make public. While the information may never be disclosed, the juror is nevertheless required to publicly disclose that there is some confidential information about himself relating to the subject of the question. The private disclosure of the confidential information in camera to the judge does not protect the juror who, after the trial, returns to his or her friends, family and associates who

have been made aware of the existence but not the exact nature of some information about the juror's past which he or she wishes not to disclose publicly. Facing this prospect, the juror during voir dire faces a strong incentive to not admit the existence of any confidential information. The failure to make such admission would allow biases and prejudices to go undisclosed, posing a threat to the jury system and the defendant's constitutional right to a fair and impartial jury.

III

THE COURT OF APPEAL DECISION UNNECESSARILY BURDENS THE CRIMINAL JUSTICE SYSTEM

The Court of Appeal's holding is that jurors cannot communicate confidential information to the judge and attorneys in a written questionnaire because no prior assurance of confidentiality can be given. The Court of Appeal interpreted the *Press-Enterprise Co.* case to require oral communication in camera with a transcription being preserved. This requirement is a difference without any legal distinction. The issue of confidentiality remains the same in both instances, i.e., should those portions of a written questionnaire marked confidential by a respondent or the transcript of an in camera proceeding requested by a juror be released to the public? From a practical perspective, there is a tremendous difference. The use of written questionnaires is becoming an increasingly popular means of expediting jury trials nationwide. If it cannot be used to transmit confidential information, its usefulness is significantly reduced. By utilizing the questionnaire in this case, the court was able to shorten the jury voir dire process from its six to eight week

normal length to just eighteen days. The judicial economy achieved in this case alone by using the questionnaire is impressive. Using it in all future proceedings would have an immeasurable impact on our court system. These economies are achievable only because of the questionnaire and by its use to shorten the oral voir dire process. If confidential responses must be made orally on an individual basis in the judge's chambers, the voir dire process will be lengthened and judicial economies lost.

The Court of Appeal addressed this issue and applauded it as a "praiseworthy purpose" but discarded it as not having any legal significance or "weight . . . when compared to a constitutional interest." (Court of Appeal Opinion, pp. 10-11.)

The Court of Appeal missed the point. No one objects to the public and media gaining access to whatever the Constitution entitles them. However, they are not entitled to confidential information and the disclosure of that information to the court and attorneys by way of written responses to a questionnaire should be allowed without offending the Constitution, the public or the media. Requiring the disclosures to be made orally in a judge's chambers adds nothing but a lengthy, time consuming process. If the disclosures can be submitted in writing, tremendous economies are achieved and that should further everyone's interest to the impairment of none.

CONCLUSION

For the reasons set forth above, petitioner respectfully urges the Court to grant this petition. The use of a written questionnaire to assist oral voir dire examination of prospective jurors does not violate the press' right of access to information. The public and press are not entitled to confidential information. Confidential information may be presented to the court and attorneys in written form without violating the standards set by this Court in *Press-Enterprise Co., supra,* 464 U.S. 501 [78 L.Ed.2d 629].

DATED: August 21, 1991

Respectfully submitted,

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APPENDIX

OPINION ON REMAND FROM THE CALIFORNIA SUPREME COURT CERTIFIED FOR PUBLICATION COURT OF APPEAL, FOURTH APPELLATE DISTRICT DIVISION ONE STATE OF CALIFORNIA

THE COPLEY PRESS, INC., Petitioner, v. SAN DIEGO COUNTY SUPERIOR COURT, Respondent.	)	D011794 (Sup. Ct. No. CRN15334)

Proceedings in mandate after denial of motion to release confidential jury questionnaires, Superior Court of San Diego County, Franklin Mitchell, Judge. On remand from the Supreme Court, petition granted with directions.

Harold W. Fuson, Jr., Judith L. Fanshaw, Gray, Cary, Ames & Frye, Marilyn L. Huff and John Allcock for Petitioner.

Lloyd M. Harmon, Jr., County Counsel, Daniel J. Wallace, Chief Deputy County Counsel, and Lewis P. Zollinger, Deputy County Counsel, for Respondent.

Edwin L. Miller, Jr., District Attorney, Thomas F. McArdle and James E. Atkins, Deputy District Attorneys, Fletcher & Patton and William R. Fletcher for Real Parties in Interest.

This matter, first decided by this court on September 11, 1990, is again before us pursuant to a remand for

further consideration from our Supreme Court. The Supreme Court directed us to vacate our original opinion (223 Cal.App.3d 994) and consider the matter anew in light of *Lesher Communications, Inc. v. Superior Court* (1990) 224 Cal.App.3d 774. Accordingly, on December 19, 1990, we ordered our first decision vacated and asked the parties to brief how *Lesher* affects our proceedings.

All of the parties agree that *Lesher* differs from our original opinion in that *Lesher* holds the public or press does *not* have access to jury questionnaires filled out by venirepersons who are not called to the jury box for oral voir dire. We agree this is a valid distinction between the two opinions, and we shall adopt the *Lesher* holding. Further, we conclude this is the only valid distinction in the holdings of the two cases, a conclusion apparently shared by the panel in *Lesher*, which voiced its agreement with our earlier opinion "with but one exception" — namely the confidentiality of questionnaires filled out by venirepersons who are not called to the jury box. (*Lesher, supra*, 224 Cal.App.3d at p. 779.)

However, two of the parties -- Copley Press and the Superior Court -- contend there is another distinction concerning whether questions included in the jury questionnaire dealing with juror qualification are confidential. We disagree. It is apparent that the questionnaires involved in the two cases are different, with the questionnaire here containing 219 questions while the one in *Lesher* contained 120. Nothing in *Lesher* indicates the questions contained in that questionnaire included the type of confidential information (e.g., telephone number, social security number, driver's license number) that is essential for the determination of juror qualification and

management of the jury system as was the case here.[1] Indeed, the inference we draw from the single paragraph devoted to the issue in *Lesher*, is in that case such information already had been gathered before the venirepersons were asked to fill out the 120-question questionnaire. Accordingly, we stand by our original view, expressed in part III of the opinion, *infra*, that certain information, (e.g., telephone number, social security number, driver license number) that is essential for the determination of juror qualification and management of the jury system, but is not properly part of the voir dire, should be kept confidential.

In light of the distinction made in *Lesher* and the Supreme Court's remand of the case, we reissue our original opinion as modified below:

The Copley Press, Inc. (Copley), publisher of the San Diego Union and The Tribune, has petitioned for a peremptory writ of mandate by which it seeks access to confidential voir dire questionnaires used in a capital case. As will be seen, the press is constitutionally entitled

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[1] The single paragraph dealing with this issue in *Lesher, supra*, 224 Cal.App.3d at page 779, reads as follows: "Finally, we reject respondent court's contention that certain information contained in the questionnaire is designed to determine juror qualification and should remain confidential pursuant to *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258. Presumably, the jurors have already submitted such information, been deemed qualified, added to the master jury rolls, and now been called to service. Examination of the 120 questions included in the subject questionnaire leads to but one conclusion concerning their purpose: to select a fair and impartial jury in *this* case, People v. Sapp." (Original italics.)

to have access to such questionnaires. However, because of particular circumstances involved in this case, our holding shall have prospective application only.

FACTS

This case stems from the criminal trial of Roberta D. Pearce, who was charged with the murder of her husband and the special circumstances that the murder was done for financial gain (Pen. Code, § 190.2, subd. (a)(1)) and the murder was committed while lying in wait (Pen. Code, § 190.2, subd. (a)(15)). During the voir dire of this capital case, a reporter for the San Diego Union who was attending the proceedings submitted a written request to the trial court for access to questionnaires filled out by venirepersons. The trial court did not release the questionnaires.

In accordance with established court procedures authorized by Code of Civil Procedure section 205 and Division VIII, Section Four, Rule 4.1, of the San Diego Superior Court Rules, a detailed questionnaire had been distributed to 300 prospective jurors. Because the case involved the death penalty, the trial court had instructed the jury commissioner to include questions by the trial attorneys to facilitate the voir dire process. The questionnaire contained 219 questions.[2] An instruction sheet

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[2] The bulk of the questions were not of a confidential type; however, a number of them elicited information that to some people would be of a confidential nature. For example, venirepersons were asked if they had been the victims of child

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for the questionnaire informed the prospective jurors of the following:

> "[T]he information contained in this questionnaire will become part of the court's permanent record. However, it will not be distributed to anyone except [the trial court], [the court's] staff and the attorneys in the case while it is pending."

After the prospective jurors filled out their questionnaires, they were called by appointment for individual voir dire, which was held in the courtroom and was open to the public. Approximately one-half of the prospective jurors were excused for hardship or other cause. At the point when there were 80 venirepersons who had not been excused for cause, the trial court divided them into two groups of 40 and told each group to report at a specific time. At these times, the attorneys were afforded the opportunity to exercise their peremptory challenges. The peremptory challenges for all prospective jurors were exercised within 2 1/2 to 3 hours. The entire voir dire examination took 18 days, including one day for the venirepersons to fill out the questionnaires.

On January 25, 1990, counsel for Copley filed a motion, which in essence requested the trial court to release the questionnaires. On February 22, 1990, the trial court heard argument on Copley's motion. The request

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molestation or other forms of child abuse and if they or their relatives had sought counseling, or have had a chemical dependency.

was denied. On March 12, 1990, Pearce was found guilty. On March 14, 1990, Copley filed this petition.

DISCUSSION

I

In hearing this writ and fashioning the remedy that we propose, we are cognizant that not only voir dire but the entire trial has been completed.[3] Regardless of that fact, the issues this case raises are " 'capable of repetition, yet evading review.' " (*Nebraska Press Ass'n* v. *Stuart* (1976) 427 U.S. 539, 546 [96 S.Ct. 2791], quoting *Southern Pacific Terminal Co.* v. *ICC* (1911) 219 U.S. 498, 515.) It is reasonable to assume that Copley, as publisher of two newspapers in San Diego County, would be denied access to confidential questionnaires in another capital trial held in the county.[4] And it is possible — as happened in this case — review of the issue will be put off for more than a month, in which time voir dire would be completed and possibly the trial as well. Thus, it is in the public interest that we proceed with this writ proceeding (*Kirstowsky* v. *Superior Court* (1956) 143 Cal.App.2d 745, 749; see also *DiGiorgio Fruit Corp.* v. *Dept. of Employment* (1961) 56

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[3] Copley, nonetheless, continues to seek release of all the questionnaires.

[4] We take judicial notice of *The Copley Press, Inc.* v. *Superior Court* (*People* v. *Watkins*) (D008333; Super. Ct. No. CRN 9925), another capital case in which Copley sought similar relief. That petition was denied because voir dire was never completed and we concluded the issues presented were moot.

Cal.2d 54) and produce what, as will be seen, is an opinion with prospective application only.[5]

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[5] We observe that on June 5, 1990, the voters enacted Proposition 115, which repeals section 223 of the Code of Civil Procedure and replaces it with a new section 223 to the Code of Civil Procedure. The new section provides: "In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. [¶] Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. [¶] The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."

We note that if this portion of Proposition 115 is ultimately upheld by the California Supreme Court, the nature of voir dire will be changed drastically with the elimination of the use of voir dire to assist in the exercise of peremptory challenges. Many of the questions on the questionnaire used in this case, e.g., "What was the last grade you attended in school?"; "Do you belong to any group or organization active in political matters . . . ?", would no longer be allowed in the typical criminal case. (On December 24, 1990, the Supreme Court, with but one exception, not relevant here, rejected a two-prong attack on Proposition 115, challenging the measure on the grounds it violated (1) the "single subject" rule embodied in Article II, section 8, subdivision (d) of the state Constitution and (2) the rule requiring constitutional "revisions" to be accomplished by more formal procedures than are contemplated for mere constitutional "amendments" (see Cal. Const., art. XVIII). (*Raven v. Deukmejian* (1990) 52 Cal.3d 336.))

II

As respondent Superior Court concedes, the United States Supreme Court in *Press Enterprise Co.* v. *Superior Court of Cal.* (1984) 464 U.S. 501 [104 S.Ct. 819] established that the First Amendment to the United States Constitution affords a right of access to the voir dire examination of the jury in a criminal trial.

Press Enterprise, supra, 464 U.S. 501, involved the capital trial of a man charged with rape and murder of a teenage girl. Before voir dire examination of prospective jurors began, the Press-Enterprise newspaper moved that voir dire be open. The trial court allowed the newspaper to attend only the general voir dire, closing the individual voir dire of venirepersons. The entire voir dire took six weeks, with three days open to the public. After the jury was impaneled, the newspaper asked the trial court to release complete transcripts of the voir dire proceeding. The trial court refused. After the defendant was convicted and sentenced to death, the newspaper renewed its request. It again was denied. The Court of Appeal denied the newspaper's petition for writ of mandate. The United States Supreme Court reversed, vacating the order denying relief.

The Supreme Court traced the history of jury selection and noted "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." (*Press Enterprise, supra,* 464 U.S. 501 at p. 505.) The Supreme Court also discussed the value of having open proceedings:

> " . . . No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.
>
> "The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. [Citation.]" (*Id.* at p. 508.)

However, the right of access — be it to be voir dire or other portions of the trial -- is not absolute. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Press Enterprise, supra*, 464 U.S. 501, 510; see also *Globe Newspaper Co.* v. *Superior Court* (1982) 457 U.S. 596, 606-607.)[6]

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[6] In determining whether to impose limitations on access to a trial, " '[T]he question in a particular case is whether the control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.' " (*Richmond Newspapers, Inc.* v. *Virginia* (1980) 447 U.S. 555, 582, fn. 18 [100 S.Ct. 2814], quoting *Cox* v. *New Hampshire* (1941) 312 U.S. 569, 574.)

Here, the respondent Superior Court argues maintaining the confidentiality of the questionnaires supports three overriding interests: (1) administering an expeditious trial; (2) preserving the defendants's right to a fair and impartial jury trial; and (3) protecting the juror's right to privacy.

While efficient judicial administration is a praiseworthy purpose and one we applaud, it does not reach constitutional dimensions. As much as we would like to see judicial proceedings run efficiently and expeditiously, we cannot give much weight to such a goal when compared to a constitutional interest.

With respect to protecting the criminal defendant's right to a fair trial, we agree it is the sort of compelling interest that can override the First Amendment right of access. But there is no showing that in this case these two constitutional interests were in conflict. In *Press-Enterprise, supra,* 464 U.S. 501, the Supreme Court said that when the presumption of openness is overcome by an overriding interest, the trial court must articulate the overriding interest "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Id.* at p. 510.) The trial court made no such findings below.[7] In this writ

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[7] The trial court found the questionnaires were not part of the voir dire proceeding, but rather court assistance to the attorneys in obtaining background information concerning the venirepersons. The court also found there was no tradition of press access to such questionnaires, and, therefore, Copley's request did not come under *Press Enterprise, supra.* In this writ proceeding, respondent Superior Court continues to maintain

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proceeding, the respondent Superior Court, in discussing the defendant's right to a fair trial, advances five reasons for preserving the confidentiality of the questionnaires: (1) the questionnaires equalized access for the parties to discovery of prospective jurors' backgrounds; (2) the prospective jurors gave more complete, frank and open information because of the assurances given them that their responses would be confidential; (3) counsel could more intelligently exercise challenges because biases and prejudices of the prospective jurors were more readily detectable through the use of the confidential questionnaires; (4) the questionnaires enabled counsel to be better prepared to examine the prospective jurors; and (5) use of the questionnaires markedly expedited the voir dire procedure. Again, we note the laudable nature of these results, but is obvious — particularly in the absence of specific facts or findings relevant to this case — the absence of any of them or all of them would not have prevented the defendant from having a fair trial. Furthermore, in addition to making findings, the trial court is required to consider alternatives to closure. (*Press-Enterprise, supra,* 464 U.S. at p. 511.) Here, the trial court failed to consider alternatives to maintaining the confidentiality of the questionnaires. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire.*" (*Ibid.*)

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the questionnaires were part of the discovery process rather than part of the voir dire proceeding. We shall consider this argument in part IV, *infra.*

With respect to the jurors' right to privacy, respondent Superior Court has identified another interest of constitutional dimension. (*Roe* v. *Wade* (1973) 410 U.S. 113 [93 S.Ct. 705]; *Griswold* v. *Connecticut* (1965) 381 U.S. 479 [85 S.Ct. 1678]; Cal. Const. Art. I, § 1.) Further, it is clear that here this interest has the potential to be in conflict with the First Amendment right of access to the questionnaires. In *Press-Enterprise, supra,* 464 U.S. 501, 511-512, the Supreme Court observed:

> "The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. . . . The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.
>
> "To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of the sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record." (*Press-Enterprise, supra,* 464 U.S. at pp. 511-512.)

Thus, *Press-Enterprise, supra,* 464 U.S. 501, teaches that an individualized approach rather than a blanket one is appropriate in considering the privacy rights of prospective jurors. Not only does such an approach preserve the constitutional values of openness, it also enables the

trial court to "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." (*Id.* at p. 512.)

This Supreme Court precedent also instructs that when limited closure is in order, the trial court should strive to restrict access as narrowly as possible so that the salutary nature of openness can be preserved to the largest extent possible. (*Id.* at pp. 512-513.)

We find the suggestions offered in *Press-Enterprise, supra,* 464 U.S. 501, on how to minimize the effects of closure applicable to the use of confidential questionnaires. For example, in *Press-Enterprise,* the Supreme Court suggested:

> "When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment." (*Id.* at p. 512.)

Of course, each case will have its own particular facts regarding the extent to which legitimate privacy rights should be protected. In any event, pursuant to the guidance of the United States Supreme Court, we believe the proper approach is to have the superior court advise the venirepersons that they have the right to request in camera hearings on sensitive questions rather than writing their answers in the questionnaire. Counsel should be

present and the session should be reported, with the trial court determining afterward on the record whether a legitimate privacy interest warrants protection. If it does, the trial court should then seal the transcript of the hearing. Henceforth, the superior court shall inform the venirepersons of their right to request in camera hearings to answer specific sensitive questions rather than filling out those answers on the questionnaire form. No explicit or implicit promise of confidentiality should be attached to the information contained in the questionnaires; rather the venirepersons shall be expressly informed the questionnaires are public records. Second, the superior court shall provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral voir dire. Public access shall not be provided to questionnaires filled out by venirepersons who are not called to the jury box.[8]

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[8] In *Lesher, supra,* 224 Cal.App.3d at page 779, the court explained: "*Press Enterprise* does not require that disclosure be made of questionnaires submitted by venirepersons never called to the jury box for voir dire; we assume that these questionnaires play no role whatsoever until a prospective juror is actually called to the jury box. The *Press Enterprise* court rested its decision that voir dire must be open to the public on the interest of the public in open criminal trials. A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venirepersons who are never called to the jury box do not play any part in the voir dire or the trial. They fill out the questionnaire only as a prelude to their participation in voir dire. The questionnaire serves no function in the selection of the jury unless the person filling it out is actually called to be orally questioned.

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III

In light of our holding that the public has the right of access to written questionnaires submitted by venirepersons called to the jury box for oral voir dire, we deem it appropriate to discuss the hybrid nature of the particular questionnaire before us.

Code of Civil Procedure section 205 provides:

"(a) If a jury commissioner requires a person to complete a questionnaire, the questionnaire shall ask only questions related to juror identification, qualification, and ability to serve as a prospective juror.

"(b) Except as ordered by the court, the questionnaire referred to in subdivision (a) shall be used solely for qualifying prospective jurors, and for management of the jury system, and not for assisting in the courtroom voir dire process of selecting trial jurors for specific cases.

"(c) The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voir dire process or to ascertain whether a

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We see no legitimate public interest in disclosure of these questionnaires."

In our original opinion, we had held access should be provided for the questionnaires submitted by venirepersons never called to the jury box because of our concern such questionnaires could be used by counsel in the peremptory challenge process to decide whether to excuse those venirepersons already in the jury box. In balancing this consideration against the jurors' right of privacy, we are now persuaded the *Lesher* rule is the more reasonable.

> fair cross section of the population is represented as required by law, if such procedures are established by local court rule.
>
> "(d) The trial judge may direct a prospective juror to complete additional questionnaires as proposed by counsel in a particular case to assist the voir dire process."

Our inspection of this jury questionnaire leads us to conclude that in this case the 300 prospective jurors were asked to fill out a questionnaire that was designed to determine juror qualification (Code Civ. Proc., § 205, subd. (a)) as well as to assist in the voir dire (Code Civ. Proc., § 205, subd. (c) and (d)). Thus, because the hybrid nature of the questionnaire, certain information (e.g., telephone number, social security number, driver's license number) is included that is essential for the determination of juror qualification and management of the jury system but is not properly part of voir dire, and public access to it is not warranted. Information of this type should be segregated from the other questions and not released to the public. (See *Pantos* v. *City and County of San Francisco* (1984) 151 Cal.App.3d 258.)

IV

Respondent Superior Court's argument the questionnaires were not part of the voir dire but rather pretrial discovery is not persuasive.

Respondent relies on *People* v. *Murtishaw* (1981) 29 Cal.3d 733, overruled on other grounds in *People* v. *Boyd* (1985) 38 Cal.3d 762, 772-773, which recognized that the prosecution's access to background information about prospective jurors provided an advantage that could only

be equalized by allowing the defense access through discovery. The *Murtishaw* court held "a trial judge will have discretionary authority to permit defense access to jury records and reports of investigations available to the prosecution." (*Id.* at p. 767.) *Murtishaw*, therefore, stands for the proposition that the trial court can order the prosecution to share its discovery about the background of venirepersons with the defense. It does not authorize, as the trial court here apparently believed, the court to conduct discovery for the parties. Thus, *Murtishaw* is not on point. The questionnaires were produced and generated by the Superior Court; therefore, if the questionnaires were part of discovery the court was participating in discovery. The function of the trial court is to adjudicate cases; it is not in the discovery business.

Furthermore, we find telling the following exchange between counsel for Copley and the trial court:

> "[Copley counsel]: But the point, I believe, your Honor, is that the voir dire process was not, of course, limited to the oral questions and answers in open court; the voir dire process began with the eliciting of information from the jurors.
>
> "The Court: That's correct. What occurred is that the attorneys and the court collaborated together on what you might call an inquiry or investigation of the jury panel."

It is clear that when the court distributed the questionnaires to the venirepersons with instructions to fill them out, voir dire had begun. The fact that the questioning of jurors was largely done in written form rather than orally is one of no constitutional import.

V

Here, each prospective juror was informed the questionnaire he or she filled out would become part of the court's permanent record. However, another representation was made to these 300 venirepersons, namely that the questionnaires they filled out would "not be distributed to anyone except [the judge], [the judge's] staff, and the attorneys in the case while it is pending."[9]

As indicated above, the blanket denial of access to the questionnaires here was unconstitutional. Nonetheless, we conclude that to not honor the trial court's assurance of confidentiality would be unfair to the venirepersons in this case who presumably relied on that assurance. For one thing, those prospective jurors whose backgrounds include information meriting privacy protection were not afforded the opportunity to bypass the written answer to sensitive questions on the questionnaire by requesting an in camera hearing so they would protect potentially legitimate privacy concerns.

Given the representation made to the venirepersons by the trial court, we believe general principles of estoppel should bar release of the questionnaires used in this case. Accordingly, we shall not order them released.

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[9] Despite the vagueness of this implied assurance of confidentiality, we have no doubt that the venirepersons inferred that the questionnaires they filled out were going to be permanently confidential. In our view, under the circumstances presented here, it does not matter that this representation was more of an implied promise of confidentiality than an explicit one.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court in all future cases in which jury questionnaires are used to (1) segregate juror qualification information from other questions, (2) plainly instruct the venirepersons in the body of the questionnaire that (a) the written responses are not confidential, i.e. the questionnaires are public records, and (b) the venirepersons have a right to request an in camera hearing to discuss their responses to any questions they do not wish to answer in writing, and (3) provide access to the questionnaires in accordance with the views expressed above.

CERTIFIED FOR PUBLICATION

/s/ _____
TODD, J.

I CONCUR:

/s/ _____
KREMER, P.J.

Nares, J., concurring:

Absent excuse, citizens are required to attend jury service for nominal remuneration ($5-per-day) and one-way mileage. Compelled by United States Supreme Court precedent, today we order (in future cases) the potential public release of sensitive personal information obtained not by consent, but by compulsion.

The questionnaire seeks highly personal information from each prospective juror. For example, the questionnaire asks, "Have you ever sought any type of counseling for problems in a marriage from someone such as a priest . . . . ?" Another question asks, "Do you believe that the lives of some people are more important than others?" Question 177 states, 'Did or does either of your parents use alcohol or drugs to excess?" and another states, "Were you the victim of child molestation or other forms of child abuse. If yes, how has that affected you in your adult life?"

The majority attempts to safeguard the prospective jurors' privacy rights -- rights it acknowledges have constitutional dimensions -- by requiring a non-confidentiality warning be placed in the "body of the questionnaire." Given the potential intrusion into a prospective juror's personal life, in my view, merely a written warning in the "body" is insufficient. First, the written warning should be placed in the questionnaire's introduction and should be printed in bold type.

Second, in *addition* to the written warning endorsed by the majority, before distributing the questionnaire, the trial court should orally alert the prospective jurors their responses are not confidential and will be accessible by newspapers, radio, television, and all other forms of print or electronic media. The trial court should orally advise prospective jurors that if they believe public disclosure of their answer to particular questions may be embarrassing or otherwise infringe on their privacy rights, they should ask for a hearing in chambers before answering the question(s). The court should further orally instruct prospective jurors that the attorneys and court reporter will be

present during any such chambers proceeding, and that their request for confidentiality does not insure the answer will remain confidential.

With this additional safeguard, and compelled by the authorities cited in the majority opinion, I concur.

/s/ _____

NARES, J.

Fourth Appellate District,
Division One, No. D011794 S018022

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

FILED MAY 23 1991

THE COPLEY PRESS INCORPORATED, Petitioner

v.

SAN DIEGO COUNTY SUPERIOR COURT, Respondent

THE PEOPLE Et Al., Real Parties In Interest

Respondent's petition for review DENIED.

LUCAS
Chief Justice
